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Attention: Jennifer J. Johnson
Secretary, Board of Governors
of the Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, DC 20551

Re: Docket No. R-1168
Proposed Rule Changes to Regulation B and Staff Commentary
(Changes to definition of "clear and conspicuous" disclosures)

Ladies and Gentlemen:

Wells Fargo & Company and its affiliates ("Wells Fargo"), including Wells Fargo Bank, N.A., Wells Fargo Home Mortgage, Inc. and Wells Fargo Financial, Inc., appreciate the opportunity to comment on the proposed rule and staff commentary regarding a uniform standard for "clear and conspicuous" disclosures under Regulation B (and Regulations E, M, Z, and DD). Wells Fargo is a financial services company that owns and operates national banks in 23 Western and Midwestern states, the nation's leading retail mortgage lender, and one of the nation's leading finance companies,

PROPOSED UNIFORM STANDARD FOR "CLEAR AND CONSPICUOUS" DISCLOSURES

The Board proposes a uniform standard for "clear and conspicuous" disclosures under Regulations B, E, M, Z, and DD. The purpose of the proposal is twofold: to help ensure that consumers receive *noticeable* and *understandable* information required by law in connection with obtaining consumer financial products and services; and to help facilitate compliance through consistency among these five regulations, Although the ostensible benefits of consistency by means of a suitable uniform standard for ***noticeable*** and ***understandable*** information may help facilitate compliance in some respects, we question whether a uniform standard is needed or appropriate in light of the different enabling statutes and the different purposes, considerations, and concerns of the respective disclosures required under each of those statutes.

Ow greatest concern, however, is with the proposed standard itself "Clear and conspicuous means that the disclosure is reasonably understandable and designed to call attention to the nature and significance of the infannation in the disclosure." We find the first component of this proposed standard – "reasonably understandable" (clear) – to be acceptable, but we are greatly troubled by the second component of the proposed standard – "designed to call attention to the nature and significance of the information in the disclosure" (conspicuous). While the first component appears to be appropriate and consistent with the stated purpose of the new proposal that consumers receive

understandable information, the second component goes well beyond the stated purpose of the new proposal that consumers receive *noticeable* information.

The Second Component of the Proposed Standard Is Inappropriate, Provides No meaningful Benefit *to* Consumers, and Is Unworkable and Risky to Financial Institutions

We do not support the second component of the proposed clear and conspicuous standard, which requires that the disclosure must be "designed to call attention to the nature and significance of the information in the disclosure." The proposal to impose this highly subjective higher standard for disclosures is inappropriate, provides no meaningful benefit to consumers, and is unworkable for financial institutions.

The Second Component Is Inappropriate

This second component of the definition is drawn from the higher standard applicable to privacy notices – which address pervasive infomation sharing and security practices. Regulation P §216.3(b). The Supplementary Information for the Final Privacy Rule notes that "[t]he Agencies recognize that the proposed definition develops the *concept* of 'clear and conspicuous' beyond what is currently understood by the term."[1]

Privacy notices address comprehensive information sharing and security practices of an entity; privacy notices can (and should) stand on their own in a separate notice or in a discrete separate section of a combined notice, Regulation B disclosures (and disclosures required under the other four regulations), however, are given in connection with a particular financial product or service and are meaningful only in the context of that consumer or business product or service. Unlike Regulation P privacy notices, Regulation B disclosures are provided in a variety of application forms, credit disclosures, online displays, ATM screens, ordinary letters, and adverse action notices, including those given to businesses for business-purpose transactions. Regulation B disclosures, for example, often must carefully be integrated with supplemental explanatory information, account provisions, credit terms and a variety of other critical information; segregating or otherwise *drawing attention to the nature and significance* of Regulation B disclosures in such materials as product brochures (which frequently contain a variety of product information, contract terms, state disclosures, other federal disclosures and required information for related warranties or programs) not only would make the Regulation B disclosures less meaningful, but it also would make the overall information and other required disclosures less meaningful.

There *are* significant problems in calling attention to Regulation B disclosures vis-à-vis other "clear and conspicuous" disclosures. The federal Fair Credit Reporting Act (FCRA), for example, requires institutions to provide certain "clear and conspicuous" disclosures in various situations – such as certain affiliate sharing disclosures, firm offer of credit solicitation disclosures, and addresses for reporting inaccuracies – but not under

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[1] Supplementary Information Section III.b. to Final Privacy Rule issued jointly by the banking agencies on June 4, 2000.

a higher standard.[2] Ohio law requires a conspicuous state law disclosure (in a type *size* no smaller than that used throughout most of the application form) on written application forms.[3] If the proposed standard for Regulation B is adopted, it would be difficult, if not impossible, to provide disclosures under different laws or regulations with different standards on the same page. The financial institution would need to *call attention* to the Regulation B disclosures, making them stand out (in some fashion) from the FCRA or state law disclosures, which would have the effect of making the FCRA or state law disclosures less conspicuous. As we pointed out in our Regulation Z comment letter, the proposed standard would create at least five separate levels of inappropriate and unmanageable disclosures?

The meaning and scope of the proposed higher standard in the context of Regulation B is particularly troublesome. While the meaning and scope of many of the disclosure requirements in Regulation B always has been less than clear, it is now problematic because of the higher standard. For purposes of Regulation B, a creditor "that provides in writing any disclosures or information required by this regulation must provide the disclosures in a clear and conspicuous manner. . . ." This means that a financial institution would have to *call attention to the nature and significance* of certain types of ill-defined information in peculiar situations, Consider, for example, the following:

> Financial institution responds in writing to a large corporation (which has, let's say, $1 billion in gross annual revenues) that has submitted insufficient information (incomplete application) for a large loan request. The financial institution sends a three-page letter to that corporation in which the institution asks for several items of additional financial information (e.g. sales receipts to confirm several of its large sales, previous year's tax return, recent bank statements) that it requires for a complete application; the letter also informs the corporation that if it would like to be considered for a discounted rate on the loan

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[2] FCRA §603(d)(2)(A)(iii); §615((d)(1); §623(a)(1)(C).

[3] Ohio Rev. Code §4112.021(B)(1)(g).

[d] The proposed standard (when read in conjunction with the proposed examples in the Staff Commentary) would create at least five separate levels of "conspicuous" disclosures in the context of Regulation Z:

(1) ***Regular Contract Provisions*** – least conspicuous;

(2) ***State Disclosures and Certain Federal Disclosures (e.g. FCRA)*** – conspicuous, but conspicuous in a way different than Regulation Z disclosures;

(3) ***Regulation Z (and Regulation B, E, M, or DD) Disclosures*** – more conspicuous than (1), different than (2), and less conspicuous than (4) and (5);

(4) *"Keywords"* in ***Regulation Z (and Regulation B, E, M, or DD) Disclosures*** – more conspicuous than (I) - (3) but less conspicuous than (5) [See Proposed Staff Commentary – under "2. Designed to call attention." example *iv.* "use boldface or italics for key words."];

(5) ***"Finance Charge" and "Annual Percentage Rate" When Required To Be Disclosed with an Amount or Rate*** – more conspicuous than (1) – (4). See Regulation Z 226.5(a)(2) and 226.17(a)(2).

or for eligibility for a favorable cash management deposit product, certain additional financial information should be provided.

Not only would the higher standard for written Regulation B disclosures apply in this example, but it would have unclear and perhaps unintended consequences. What specific text in the letter will be considered information required by Regulation B? How would the institution *call attention to* the *nature and significance of this information* in the context of this lengthy three-page letter? Why should this higher standard for Regulation B disclosures apply at all to written correspondence with a large, sophisticated corporation?

The Board also does not appear to take into account the application of the higher standard for Regulation B disclosures in some of its own model application forms. The proposed rule mentions no changes to model forms, yet the caption headings and certain additional text in the model Uniform Residential Loan Application set forth in Regulation B use boldface typesize that is larger than the regular text (regular typesize) used for certain disclosures required by the regulation. As one example, the protected ***income disclaimer*** disclosure[5] appears only as regular text in regular type size in the Uniform Residential Loan Application. Based on the examples in the proposed Staff Commentary, this model form does not appear to *call attention* to *the nature and significance* of the protected ***income disclaimer*** disclosure in a manner sufficient to comply with the proposed higher standard. The *protected income disclaimer disclosure* is not separated and uses no special typeface or typesize, boldface or italics, or other measures to ***call attention*** *to* the ***nature*** *and* ***significance of*** this *information.*

The Second Component Would Provide No Meaningful Benefit to Consumers or Businesses

The second component of the proposed standard also would provide no meaningful benefit to consumers (or to businesses), Everyone would agree that disclosures under these five regulations should be noticeable and not inconspicuous, but a higher standard for these lengthy disclosures would provide no meaningful benefit to consumers (or to businesses). The higher "clear and conspicuous" standard for lengthy privacy disclosures has done little, if anything, to enhance consumer awareness of the content in privacy disclosures or make them more meaningful in any respect. See Interagency Proposal to Consider Alternative Forms of Privacy Notices under the Gramm-Leach-Bliley Act. 68 Fed. Reg. 75,164 (December 30, 2003).[6]

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[5] Regularion B §202.5(d)(2).

[6] The joint banking agencies have implicitly recognized that the higher standard for lengthy Regulation P disclosures has not achieved its intended purpose to make privacy notices more readable and useful to consumers. The Agencies are now considering how to improve the readability and usefulness of privacy notices in light of concerns expressed by financial institutions, consumers, privacy advocates, and members of Congress alike about complex and lengthy privacy notices. "The primary matter the Agencies are now considering is whether to develop a model privacy notice that would be short and simple." See Interagency Proposal *to* Consider Alternative Forms of Privacy Notices under the Gramm-Leach-Bliley Act. 68 Fed. Reg. 75, 164 (December 30,2003).

Information overload (rather than lack of conspicuousness) is the primary concern of consumers with respect to disclosures. The proposed higher standard for Regulation B disclosures would, in effect, require additional pages, rearranging text, printing larger type sizes, and various other ill-defined steps to assure that the institution has adequately called attention to the lengthy regulatory disclosures. These steps would inevitably further increase information overload for consumers and make disclosures even more complex.

The Comptroller of the Currency, John Hawke, Jr., recently observed that:

> "In the mid-1970's, . . a study was performed that focused on 'information overload' – the concern that TILA disclosures were so extensive that they actually interfered with the ability of consumers to get information they really needed. These concerns gave rise to the Truth in Lending Simplification Act of 1980. Significantly, the Simplification Act took up more pages in the statute books than Congress needed when it enacted TILA in the first place. Suffice it to say, this well-intentioned effort did not result in a move effective, less costly disclosure regime. [Only in passing did a more recent 1996 Federal Reserve and HUD study of TILA/RESPA touch] upon what may be a more fundamental flaw in the existing TILA/RESPA disclosures – their sheer oppressive weight, their inscrutability, the confusion or cynicism they engender among consumers to whom they are given. Nor did the study come to grips with a critical basic question – a question that could be raised about almost all compliance regulation. Are the benefits being delivered to c o m e r s worth the costs being imposed on the industry?"[7]

In the case of the proposed higher standard for Regulation B disclosures, no meaningful benefits would be delivered to consumers (or to businesses), but significant costs and burdens would be imposed on financial institutions,

The Second Component Is Unworkable and Risky for Financial Institutions

Attempting to meet the higher standard, as proposed, is unworkable and risky for financial institutions. If the Regulation B proposal is adopted, as a threshold matter institutions would need to undertake a comprehensive review of each and every advertising brochure, printed credit application form, adverse action notice, online product page, kiosk display, ATM screen, and other means of disclosure, They then would need to revise them to assure that the higher standard was met for disclosures under these five regulations in every context (for Regulation B, this includes advertising disclosures, application forms, a variety of customers letters, adverse action notices, etc.). To protect against potential liability, institutions would need to act cautiously and judiciously by widening margins, increasing type sizes, adding new pages, and making numerous other changes out of an abundance of caution, all of which would result in more paper, longer online pages, additional programming costs, and other significant burdens and costs.

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[7] Remarks by John D. Hawke, Jr., Comptroller of the Currency, before the Independent Community Bankers of America, Orlando, Florida, March 4, 2003.

Even once an institution implemented changes, however, it could not be assured that it had met the highly subjective and overly complex higher standard for Regulation B disclosures. The proposed changes to the Staff Commentary (discussed in detail below) would create unclear and unsettled guidelines that provide little, if any, guidance in a variety of situations, such as electronic disclosures that are commonplace in television, radio, ATM terminals, and online advertising. Because consumers have a private right of action under the Equal Credit Opportunity Act for many types of violations, the potential for liability in this unclear and unsettled area is enormous. (Title V of the Gramm-Leach-Bliley Act and Regulation P, from which the proposed higher standards for Regulation B disclosures are dram, do not allow for a private right of action.) Different courts would read and apply this higher standard in different ways, potentially resulting in large class action awards against financial institutions.

As a final point, the Board indicates that no increase in burden would accompany the proposed uniform standard. In fact, nothing could be further from the truth, Not only would the new, higher standard disclosures result in more paper, longer online pages, additional programming costs, and other significant implementation expenses, but institutions would need to discard or destroy large quantities of existing forms and materials. The increase in burden and expense would be enormous.

Proposed Standard Should Not Be Adopted
(Any Uniform Standard Must Be Flexible)

While we appreciate the goal of the Board in seeking to establish a uniform standard for providing required disclosures under Regulations B, E, M, Z, and DD, the proposed standard should not be adopted for the reasons set forth above, The rigid higher standard fails to provide the flexibility needed to address the variety and complexity of disclosures required under Regulation B (as well as the other four regulations).

We question the need for any uniform standard but recommend that the Board look at a more flexible approach if it decides to consider this matter further. One alternative, if the Board decides to consider this matter further, is a ***noticeable*** and ***understandable*** standard: "Clear and conspicuous means that the disclosure is reasonably understandable and noticeable." Such an alternative is more consistent with the stated purpose set forth in the SUMMARY Section of this proposal: "These revisions are intended to help ensure that consumers receive ***noticeable*** and ***understandable*** information that is required by law in connection with obtaining consumer financial products and services."

A "noticeable" standard (in place of "designed to call attention to the nature and significance of the information in the disclosure" standard) would seem to provide a meaningful, yet more flexible, uniform standard that may be suitable for the different purposes, considerations, and concerns addressed by the different enabling statutes for the five regulations, A "noticeable" standard is used in the Uniform Consumer Credit Code (UCCC), which defines a disclosure as ***conspicuous*** "when it is so written that a reasonable person against whom it is to operate ought to have ***noticed*** it," The term

"noticeable" also is closer to the meaning of the term "conspicuous" in ordinary usage: "easy to notice; obvious'' *The American Heritage Dictionary of the English Language, Fourth Edition* (2000), published by Houghton Mifflin Company; "open to the view; obvious to the eye; easy to be seen" *Webster's Revised Unabridged Dictionary* (1998), published by MICRA, Inc.

If the Board decides to consider such an alternative standard, it should solicit further comments.

Specific Comments on Proposed Changes to Staff Commentary Regardbg "Clear and Conspicuous" Standard

The proposed revisions to the Staff Commentary should not be adopted; but if the Board decides to consider this matter further under the more flexible standard set forth above (reasonably *understandable* and *noticeabk),* the proposed Staff Commentary would require significant changes. We make these specific comments with respect to the proposed Staff Commentary:

Reasonably Understandable. The proposed rule generally uses examples of disclosures that are reasonably understandable; however, we point out the following:

- Wherever Possiblq. Three of the examples end with the phrase "wherever possible" instead of "wherever practicable.'' The term "possible" implies situations with even the most remote chance of probability; the term "practicable" emphasizes prudence, efficiency, and suitability. The phrase "wherever possible" should be replaced with "wherever practicable."

- Example v. This example emphasizes avoiding legal and highly technical business terminology; however, Regulation B disclosures sometimes require the use of specific, technical phrasing (e.g., Appendix C – Sample Notification Forms – form C-3). Given the complex nature of the required Regulation B disclosures, this example should be deleted.

Designed to Call Attention. Consistent with our comments above, these examples should provide illustrations of disclosures that are *noticeable* rather than *designed to call attention,* The first part of the Staff Commentary under paragraph 2 of Section 226.2(a)(27) should be revised to read:

> "2. Noticeable, Disclosures must be easy to see and not buried in the text. Examples of disclosures that are noticeable include disclosues that are:"

With respect to the particular examples, we support the examples in the proposal as illustrative of *noticeable* disclosures with the following exceptions:

• Example ii. This example, as drafted, is so subjective that it provides virtually no guidance as to sufficient type size, except to create a safe harbor for type size that is 12-point type or greater. Institutions frequently use 8-point type in a variety of disclosures today, particularly with advertising disclosures. The use of 8-point type is widely accepted and provides a realistic, objective standard for disclosures. Accordingly, Example ii should be modified to read: "Use a typeface and type size that are easy to read. Disclosures in 8-point type generally meet this standard."

• Example iii. This example, as drafted, uses "wide margins" and "ample line spacing" as illustrations. Wide margins are irrelevant to the readability of text. The word "ample" means of large or great size, well beyond what is suitable for line spacing. Accordingly, Example iii should be modified to read: "Provide appropriate line spacing."

• Example iv. This example, as drafted, suggests that institutions "use boldface or italics for key words" to make them conspicuous, The example is rather absurd in that certain key words in the Regulation B disclosure (whatever they may be) would need to be made more conspicuous than other Regulation B disclosures. In essence, this would create four levels (five levels when combined With Regulation Z or DD disclosures) of *conspicuous* disclosures (as described earlier).

• Example v. This example, as drafted, is inappropriate for a *noticeable* standard (it uses the phrase "to call attention to the disclosures"). Accordingly, Example v should be modified to read: "In a document that combines disclosures with other information, use section headings or captions to make the disclosures noticeable."

Other Information. We support the inclusion of the first sentence in this section, but the last sentence (which reads: "However, the presence of this other information may be a factor in determining whether the clear and conspicuous standard is met.") should be deleted, By its very inclusion, this last sentence will routinely be used as a factor. If the disclosure is reasonably understandable and noticeable, the presence of other information should have no bearing on the standard.

Additional Comments on Proposed "Clear and Conspicuous" Standard

Two-year Transition Period Because these proposed changes will require careful scrutiny and redrafting of all documents and electronic pages that contain disclosures, compliance with any new standards should be voluntary for a two-year period. This also will mitigate the unnecessary destruction of disclosure materials already printed or produced that may fail to comply with new standards. (New standards for ***clear and*** *conspicuous* disclosures should apply only to disclosures delivered after a mandatory compliance date following the two-year transition period.)

Thank you for the opportunity to comment on these proposed changes. We would be pleased to supplement our comments or to discuss any of them with you. Please contact the undersigned if you have any questions.

Sincerely,

John D. Wright
Assistant General Counsel